

February 24, 1999

Bank

Dear Mr. Creekman:

I write in response to your January 28, 1999 letter that posed many questions, several of which are related and rendered moot by my responses. I will thus attempt to answer your main questions in turn.

1.) Does the definition of "Consumer Loan" under WV Code 46A-1-102(15) include an organization?

You point out that the WV Consumer Credit and Protection Act ("the Act"), at WV Code 46A-1-102(15)(a), provides that a "consumer loan" must involve a debtor who "...is a person other than an organization..." Your letter notes that "organization", as defined in subsection (29), "means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative or association." Since a limited liability company does not fit the precise definition of an "organization", you are concerned that certain loans to such an entity may fall within the coverage of the Act.

We agree with you that it was not the intent of the Legislature to create such a situation. The definition of "person", at subsection (31), includes "a natural person or an individual, and an organization." Since the definition of "consumer loan" cited above specifically excludes organizations, we conclude that the Legislature intended that only natural persons or individuals could enter into a "consumer loan" as a borrower. We believe this position is supported by subsection (12), which defines a "consumer" as a "natural person who incurs debt pursuant to a consumer credit sale or a consumer loan, or debt or other obligations pursuant to a consumer lease."

Therefore, we conclude that a loan to an entity such as a limited liability company would not be subject to the Act.

James E. Creekman
Group Vice President
February 24, 1999
Page 2 of 3

As a follow up to your first question, you inquire whether the Act would apply to a loan when there are multiple borrowers and at least one is an organization. As an example you pose a situation where an individual who has placed title to his home in a trust for estate planning purposes wants to borrow money for personal purposes and secure the loan with the home. Your bank would routinely require both the individual and the trust to sign the note and the trust to sign the deed of trust.

We believe that the general intent of the Act is remedial in nature and should be liberally construed to afford the protections intended to benefit individual persons who enter consumer credit transactions. Therefore it is our view that in situations involving multiple borrowers the Act should apply if at least one borrower is a natural person or individual and the purpose of the debt is primarily for personal, family, household or agricultural purposes.

2.) Is a loan modification fee permitted under the WV Consumer Credit and Protection Act and, if so, is it a "loan finance charge" as defined in WV Code 46A-1-102(26)(a)?

Although WV Code 46A-1-102(26)(a) provides a definition of "loan finance charge", it does not include modification fees. In fact this definition specifically provides that the term "loan finance charge....does not include charges as a result of default, additional charges, delinquency charges or deferral charges." "Default charges" are banned by WV Code 46A-2-115, "delinquency charges" are provided for in WV Code 46A-3-112 and -113, and "deferral charges" are governed by WV Code 46A-3-114. "Additional charges" are enumerated in WV Code 46A-3-109. However, an examination of that section does not reveal an authorization for "modification fees".

Thus, while this situation may not be a boon for the consumer, the Act does not provide for a modification fee, therefore no fee is permitted. Of course the creditor may rewrite the loan contract, with the agreement of the debtor, making all required disclosures and imposing any charges allowed by law on a new loan.

3.) What deferral fees may be charged for precomputed and non-precomputed loans involving closed end and revolving credit?

In West Virginia, deferral fees are governed by the provisions of WV Code 46A-3-114. That statute provides, in part, that:

46A-1-102

46A-3-114

James E. Creekman

Group Vice President

February 24, 1999

Page 3 of 3

(1) With respect to a **precomputed** consumer credit sale or consumer loan, refinancing or consolidation, the parties before or after default may agree in writing to a deferral of all or part of one or more unpaid installments, and the seller or lender **may make and collect a deferral charge not exceeding the amount of the sales finance charge or loan finance charge attributable to the first of the deferred monthly installment periods multiplied by number of months in the deferral period** (the period in which no payment is required or made by reason of a deferral): Provided, That no installment on which a delinquency charge has been collected or partial payment made shall be deferred unless the amount of the delinquency charge or partial payment is first applied to the deferral charge. If prepayment in full occurs during a deferral period, the portion of the deferral charge attributable to the unexpired full months in the deferral period shall be also rebated. (emphasis added)

Our office continues to take the position that because only precomputed loans are specified in this provision, the Legislature did not intend to allow for deferral charges to be assessed in nonprecomputed loans. Therefore, regardless of whether the credit is closed end or revolving, no deferral charge may be assessed on a nonprecomputed loan.

Your letter cites the provisions of WV Code 46A-3-116 regarding changes in the terms of revolving charge accounts or revolving loan accounts. Our office interprets this section as applying only to unilateral changes in such accounts that may be imposed by the creditor. It establishes the required notice and procedure to be followed in giving the debtor that notice of the change. As noted above, modification fees are not allowed under the Act and deferral charges are provided for in WV Code 46A-3-114 only for precomputed consumer sales or loans.

I hope this letter answers your questions. If you need additional information, please feel free to contact me.

Sincerely,

Robert J. Lamont

General Counsel